FILED
SEP 30 1993
OFFICE OF THE CLERK

(3)

No. 93-359

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

vs.

CITY COUNCIL OF THE CITY OF DEL MAR; CITY OF DEL MAR, a municipal corporation; and DOES I through 100, inclusive,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One State Of California

RESPONDENTS' BRIEF IN OPPOSITION

MARK A. POTTER
Counsel of Record
Attorney for Respondents
5090 Shoreham Place, Suite 101
San Diego, CA 92122
(619) 455-9737

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

15 pp

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 1

III. SMITH MISSTATES FACTS REGARDING HIS OPPORTUNITY TO BE HEARD AND THE ALLEGED PREVENTION OF DEVELOPMENT OR SALE OF HIS PROPERTY 3

IV. NO GROUNDS EXIST FOR GRANTING CERTIORARI 4

V. THE PETITION FAILS TO STATE AN INTELLIGIBLE QUESTION OF FEDERAL LAW 5

VI. CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Citizens Sav. and Trust Co., 185 Cal. 386 (1921) 7

Banks v. Ogden, 69 U.S. 57, 17 Law. Ed. 818 (1864) 7

Fuller v. Oregon, 417 U.S. 40 (1973) 5

Mobile, Jackson & Kansas City Railroad Company v. Turnipseed, Administrator, 219 U.S. 35 (1910) 6

Webb v. Webb, 451 U.S. 493 (1980) 5

STATUTES

California Civ. Code § 831 ..... 3, 5

California Civ. Code § 1112 ..... 3, 5

California Government Code § 66412(d) 1

California Government Code § 66499.36 1

California Street and Highways Code § 8351 3

U.S. SUPREME COURT

Supreme Court Rule 10.1(c) 4

Supreme Court Rule 42.2 8

I. INTRODUCTION

There is no basis for this Court to review on writ of certiorari. The petition is frivolous; petitioner is attempting to gain access to this Court by creating, for the first time, an alleged constitutional issue. None of the courts below were presented with the vague issue raised in this petition. Consequently, none of the courts below decided the issue raised. The belated effort to create a question of federal law to obtain certiorari should be summarily rejected. Fees and costs should be awarded against petitioner.

II. STATEMENT OF THE CASE

The City of Del Mar determined that petitioner violated the California Subdivision Map Act. At the time of sale of certain lots, Smith separated the adjacent vacated alleys from lots. As a matter of law in California, a lot presumptively extends to the center line of the adjacent street.

The California Subdivision Map Act contains a comprehensive scheme of regulation to prohibit any alteration of a lot. Even a minor change such as a lot line adjustment must be preapproved. Government Code section 66412(d).

When a local agency such as the City has knowledge that a possible violation of the Subdivision Map Act may have occurred, it is required to follow a specified procedure of recording a notice and giving interested parties an opportunity to be heard. Government Code section 66499.36. The City followed the statutory procedure, held

hearings and made its determination based on the evidence presented.

After the City concluded the administrative hearing process, Smith filed a petition for a writ of administrative mandamus seeking to set aside the City's determination that the violation of the Subdivision Map Act had occurred. As Smith notes in his brief, his superior court petition claimed that the City's determination was "violative of California statutory and case law, no California precedent, politically motivated, abuse of discretion, not supported by evidence presented, arbitrary and capricious and estoppel." (Petition for Writ of Certiorari, page 6.) None of these theories for the alleged invalidity of the City's action in any way suggested a question of federal law. The actual mandamus petition set forth at Appendix to Petition L-8 to L-9 also reveals no federal question.

After the trial of the petition for administrative mandamus, the trial court denied Smith's petition on a number of procedural grounds, not the least of which was Smith's failure to provide the entire administrative record. At the hearing, Smith contended that he was denied due process because he was not provided with adequate notice and opportunity to be heard by the City on the issue of the Map Act violations. The trial court rejected this claim, finding that Smith had received both notice and an opportunity to be heard.

The California Court of Appeal affirmed on this issue, noting that the partial record contradicted Smith's claim. In addition, the California Court of Appeal affirmed that Smith's failure to provide the entire administrative record necessarily constituted a waiver of a due

process claim since the court had not been placed in a position to evaluate his unsubstantiated claim. (Appendix to Petition for Certiorari, C-57 to C-58.)

Smith then petitioned for "Review and Stay" by the California Supreme Court but raised no issue of federal law. The Petition for Review raised three issues for review:

1. Whether the lower court incorrectly interpreted California Civil Code section 831 and 1112;

2. Whether the lower court incorrectly interpreted California Streets and Highways Code section 8351; and

3. Whether the Court of Appeal opinion contained a material fact "misstatement" when it recited that "this case involves a 20-acre property in Del Mar known as the Snakewall Property." (Appendix to Petition for Certiorari, C-9 though C-14.) Thus, no question of federal law was presented to the California Supreme Court.

III. SMITH MISSTATES FACTS REGARDING HIS OPPORTUNITY TO BE HEARD AND THE ALLEGED PREVENTION OF DEVELOPMENT OR SALE OF HIS PROPERTY

Smith falsely contends that he "never had an opportunity to rebut the presumption at the administrative level . . . " Petition for Writ, page 8. As noted in Section II hereof, a similar claim was also made to the appellate court which noted that the record clearly contradicted this assertion:

> " . . . City communicated its concern about the sales of the Snakewall lots without the adjacent

> streets and alleys by June 1990. Smith received notice . . . of the September 24, 1990 hearing . . . Smith attended the meeting and was specifically asked if he wanted to speak but declined to do so. Later, the City held another hearing . . . to allow Smith an opportunity to be heard. Smith spoke at the meeting held in November 1988 [1990]. The record also indicates Smith had notice of the hearing . . . for lot U since he both attended the hearing and submitted written materials." (Court of Appeal Opinion, Appendix to Petition for Certiorari, C-34.)

Also contrary to Petitioner's misrepresentation, he has in fact sold substantial portions of his property. Homes have been developed on these other lots on the property. Smith reconveyed the alleys back to these other lots buyers, thereby negating the violations on these other lots. (Appendix to Petition for Certiorari, C-21.) The only impediment to further development or sales of Petitioner's property is Petitioner's unwillingness to comply with local and state law.

IV. NO GROUNDS EXIST FOR GRANTING CERTIORARI

As noted above, the purported question of federal law was never presented to any of the courts below. Contrary to Petitioner's suggestion, it is clear that Rule 10.1(c) is inapplicable. Smith never presented any federal question to the California Supreme Court. Nor did he present the vague issue raised here to any other court below. Thus, there is no state court decision that conflicts with applicable decisions of this court. There has been no decision of an important question of federal law.

In *Webb v. Webb* 451 U.S. 493 (1980), this Court reiterated the requirement in this regard.

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Id at p. 496-497.

In the context of due process claims, a similar result was reached in *Fuller v. Oregon* 417 U.S. 40 (1973).

> "The petitioner's brief also raises, without extended discussion, various due process claims . . . Since these contentions appear not to have been raised in the state courts, and were not discussed by the Oregon Court of Appeals, we need not reach them here." Id. at p. 50, footnote 11.

V. THE PETITION FAILS TO STATE AN INTELLIGIBLE QUESTION OF FEDERAL LAW

While making vague references to due process, the petition fails to set forth a specific, cogent argument on a federal question. Most of the petition argues whether California law has been correctly interpreted by California courts. The thrust of Petitioner's argument in this regard appears to be that California Civil Code sections 831 and 1112 should be given effect and the Subdivision Map Act should be ignored. The California courts correctly chose to reject this specious contention. The two provisions can and are being applied in harmonious fashion. Pursuant to California Civil Code sections 831 and 1112, Smith is entitled to express his intention to retain

the alley portions of lots. However, pursuant to the Subdivision Map Act, he must first receive approval for a lot line adjustment. This requirement precludes the undesirable effects which might occur if landowners are allowed to randomly shift segments from one lot to another, or allowed to hold the segments separately as "strip lots."

There is nothing arbitrary about concluding that a lot has been subdivided when a seller specifically excludes a portion of the lot. There is a direct, highly rational connection between the two facts.

As in *Mobile, Jackson & Kansas City Railroad Company v. Turnipseed, Administrator* 219 U.S. 35 (1910), the presumption here "is only to supply an inference . . . in the absence of other evidence contradicting such inference." Id at p. 43. Smith had ample opportunity to rebut the presumption by providing evidence, if any existed, to show that the lots which he owned did not include the streets. Smith failed to provide evidence, either administratively or at trial, to rebut the presumption.

Smith's real complaint goes to an issue of state law applied by a state court. The courts concluded that the California Subdivision Map Act is a comprehensive scheme of regulation which should control. There simply is no federal question presented for review.

The "contrary intention" which Petitioner was given the opportunity to show was simply whether, as Smith contended, the alley strips had . . fact previously been separated from the lots by one of Smith's predecessors-in-interest. Such a showing was necessary to support Smith's contention that he acquired the vacated alleys as a separate entity from the lots. There is simply no due

process violation by requiring a party to produce evidence on an issue which that party has raised.

Smith's citation of *Banks v. Ogden* 69 U.S. 57, 17 Law. Ed. 818 (1864) does not require a different result. The *Banks* decision demonstrates the long-standing rationality of considering the streets to be part of the lots. California has long applied this widely recognized rule. ". . . [T]he real boundary line of the property is not to the side line of the street but its center line." *Anderson v. Citizens Sav. and Trust Co.* 185 Cal. 386, 392 (1921).

Smith understood that he was changing lot lines. At the City Council hearing of November 19, 1990, Smith spoke following the staff's presentation of the factual basis for the notice of violation. According to the minutes of that hearing,

> James E. Smith, 2100 Gatun, stated he acted according to law when he sold the lots to Emsley and Roulette. He stated the lot line maps have all the signatures of the property owners. He added that the law allows him to apportion maps by deed. *Mr. Smith stated he owns vacated Serpentine and can apportion land to whatever lot is near that land.* He stated there are no violations in this situation and that the strip lot in question is an access easement per Fire Department regulations. [Emphasis added] (Ex. 20, set forth herein as Appendix 1 at App. 4.)

Smith chose to ignore the Subdivision Map Act. The City, Superior Court and Court of Appeal recognized that it applied to Smith's effort to change the lots. No federal issue was involved.

VI. CONCLUSION

The Petition for Writ of Certiorari should be denied. No federal question was presented to or decided by the California Supreme Court. The Court of Appeal addressed an unfounded claim of lack of procedural due process; however, the "question" presented here was never presented to any court below. The question presented is vague, unintelligible and unsupported by cogent argument. The Petition is frivolous. Fees and costs should be awarded against Petitioner. Rule 42.2.

MARK A. POTTER
Attorney for Respondents
City of Del Mar and
City Council of the
City of Del Mar

CIVIL D015814

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

JAMES E. SMITH,

Plaintiff and Appellant,

vs.

CITY COUNCIL OF THE CITY OF DEL MAR; CITY OF DEL MAR, a municipal corporation; and DOES I through 100, inclusive,

Defendants and Respondents.

COURT OF APPEAL
LODGED EXHIBITS

MAY 12 1992

CASE NUMBER

APPEAL FROM THE SUPERIOR COURT
SAN DIEGO COUNTY

RONALD S. PRAGER, JUDGE

NOTICE OF LODGMENT

MARK A. POTTER
Attorney at Law
5090 Shoreham Place, Suite 101
San Diego, CA 92122
(619) 455-9737

Attorney for
Respondents
City of Del Mar and
City Council of Del Mar

APPENDIX 1

NOTICE IS HEREBY GIVEN that exhibits 1 through 36, previously lodged with the trial court on June 10, 1991 (C.T. p. 134) and on September 9, 1991 (C.T. p. 225), have been lodged with the Court of Appeal.

Dated: May 8, 1992

/s/ Mark A. Potter
MARK A. POTTER
Attorney for respondents

DEL MAR MINUTES
REGULAR MEETING – NOVEMBER 19, 1990

* * *

ADMINISTRATIVE HEARINGS

ITEM 7
DETERMINATION OF WHETHER TO RECORD A NOTICE OF VIOLATION OF ILLEGAL SUBDIVISION REGARDING LOTS H, I, J, IN BLOCK 12 OF ARDEN HEIGHTS, UNIT NO. 3; OBJECTING PARTY: JAMES E. SMITH; NON-OBJECTING PARTIES: S. SCOTT EMSLEY, ROBIN EMSLEY, MARGARET ROULETTE (1306-7)

Staff report by Associate Planner Tuchscher indicated that brief history of Lots H, I, and J, reveals that the lots were created in 1910 by a map that showed the subject lots and a strip dedicated to the public for alley/roadway purposes. In 1925, the County Board of Supervisors vacated the alleys/roads. The owner of the lots could thereafter possess and use the strip area, unburdened by the prior alley/roadway interest of the public that had been vacated. As of July 31, 1925, and March 4, 1972 Lots H, I, and J included the area delineated as alleys/roads as above. In 1977, Mr. Smith purchased Lots H, I, and J together with the alley strips.

Associate Planner Tuchscher concluded that in 1988, upon the transfer of an interest in Lots H, I, and J to Emsley and Roulette, the entire area of each lot was not conveyed. Namely the alley portions of each of the lots was retained by Mr. Smith. Associate Planner Tuchscher explained that the strip lots created by Smith during the

1988 transfers to Emsley/Roulette, as described in the current deeds, do not comply with and were not created in compliance with the provisions of the Subdivision Map Act or the City of Del Mar's Subdivision Ordinance.

Staff stated that when the City has reason to believe that a lot has been subdivided contrary to law, the Subdivision Map Act directs the City to give the owner notice that the City intends to record a Notice of Violation. The purpose of the administrative hearing is to allow Mr. Smith the opportunity to present evidence as to why the Notice of Violation should not be filed with the County Recorder as to the strip lots to which he holds title.

In conclusion, Associate Planner Tuchscher stated that based upon the findings outlined in the staff report, staff recommends the filing of Notices of Violation for the strip lots mentioned above.

James E. Smith, 2100 Gatun, stated he acted according to law when he sold the lots to Emsley and Roulette. He stated the lot line maps have all the signatures of the property owners. He added that the law allows him to apportion maps by deed. Mr. Smith stated he owns vacated Serpentine and can apportion land to whatever lot is near that land. He stated there are no violations in this situation and that the strip lot in question is an access easement per Fire Department regulations.

IT WAS MOVED BY COUNCILMEMBER HUGO-MARTINEZ, SECONDED BY COUNCILMEMBER WINTERER, TO DIRECT STAFF TO RECORD A NOTICE OF VIOLATIONS FOR LOTS H, I, AND J IN BLOCK 12 OF ARDEN HEIGHTS (STRIP PORTIONS). MOTION CARRIED UNANIMOUSLY.